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**From:** Moraff, Kenneth [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6170EF3BAEF40C3BDECAB56FD74B07A-MORAFF, KENNETH]  
**Sent:** 12/17/2020 3:18:27 PM  
**To:** R1\_WD\_Managers\_SG [R1\_WD\_Managers\_SG@epa.gov]; Traviglia, Andrea [Traviglia.Andrea@epa.gov]  
**Subject:** FW: OW-The Morning Insider : 12/17/20

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**From:** Varnado, Miriam <Varnado.Miriam@epa.gov>  
**Sent:** Thursday, December 17, 2020 9:07 AM  
**To:** Water Program Contact List - Directors <Water\_Program\_Contact\_List\_\_Directors@epa.gov>  
**Cc:** Water Program Contact List - Deputy Directors <Water\_Program\_Contact\_List\_\_Deputy\_Directors@epa.gov>; Jones, Erica <Jones.Erica@epa.gov>; Looper, Catherine <Looper.Catherine@epa.gov>; Marcus, Pam <marcus.pam@epa.gov>; Rauscher, Leslie <Rauscher.Leslie@epa.gov>  
**Subject:** FW: OW-The Morning Insider : 12/17/20

Hello All,

FYI...see below.

Regards,

Miriam

***Miriam Varnado***

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**Subject:** OW-The Morning Insider



**December 17, 2020**

## NEWS

### **Politico Pro: FLORIDA ANNOUNCEMENT COMING**

The Trump administration appears poised to announce today that it will make Florida the third state to take over the federal dredge-and-fill permitting program.

### **Inside EPA: OMB approves EPA PFAS waste disposal guidance**

The White House has approved EPA's interim guidance for disposal and destruction of per- and polyfluoroalkyl substances (PFAS) for release ahead of a Dec. 20 statutory deadline to publish the document -- although it is unclear how far the guidance will go in determining which methods can successfully destroy PFAS, dubbed "forever" chemicals.

### **Inside EPA: NRDC files FOIA suit against EPA over perchlorate communications**

The Natural Resources Defense Council (NRDC) is suing EPA under the Freedom of Information Act (FOIA) in a bid to obtain records of communications between EPA, the Defense Department and industry over perchlorate -- data NRDC might use to boost a challenge to EPA's decision to forgo a national perchlorate drinking water standard.

## National Law Review: EPA Issues Draft Guidance on NPDES Permitting for Groundwater

The United States Environmental Protection Agency (EPA) issued draft guidance on Dec. 8, interpreting the Supreme Court's April 23, 2020, ruling in *Maui v. Hawai'i Wildlife Fund*.

## FULL ARTICLE

### **Politico Pro: FLORIDA ANNOUNCEMENT COMING**

The Trump administration appears poised to announce today that it will make Florida the third state to take over the federal dredge-and-fill permitting program. The move, a major priority for EPA water chief David Ross, has been in the works for years and requires that EPA determine the state's stream and wetlands protections are at least as stringent as those provided by the federal Clean Water Act 404 program.

But environmental groups have raised concerns about the transfer, arguing that having the program federally administered provides a check on the influence of deep-pocketed developers in the soggy state, and that Florida's Department of Environmental Protection doesn't have the necessary budget or workforce to implement the massive program. EPA's decision in September to allow Florida to bypass laborious Endangered Species Act consultations for highway, housing, mining and other projects has also drawn threats of litigation from green groups.

### **Inside EPA: OMB approves EPA PFAS waste disposal guidance**

The White House has approved EPA's interim guidance for disposal and destruction of per- and polyfluoroalkyl substances (PFAS) for release ahead of a Dec. 20 statutory deadline to publish the document -- although it is unclear how far the guidance will go in determining which methods can successfully destroy PFAS, dubbed "forever" chemicals.

Following inter-agency review, the White House Office of Management & Budget (OMB) Dec. 15 cleared the interim guidance, after holding teleconferences with a host of industry stakeholders in late August and early September. The agency sent the guidance for mandatory OMB pre-publication review on July 27.

EPA is expected to post the guidance on its website Dec. 18, possibly opening it up for a 60-day comment period, one industry attorney says. An EPA spokesperson did not respond to a request for information on the release date.

The much-anticipated guidance comes at a time when environmentalists have lamented an absence of options for final destruction of PFAS and fought against incineration as a method, questioning its capability to truly destroy the chemicals, which have strong carbon-fluorine bonds.

Last month, New York Gov. Andrew Cuomo (D) signed into law a ban on incineration of aqueous film forming foam -- firefighting foam -- containing PFAS in certain cities designated as environmental justice areas, effectively shutting off PFAS incineration at New York's only commercial hazardous waste incinerator.

But it is unclear if EPA's guidance will provide clarity on its position regarding incineration as a capable method. An EPA spokesperson told *Inside EPA* Oct. 1 that the guide is a "first step toward EPA fulfilling its" fiscal year 2020 National Defense Authorization Act (NDAA) obligation to publish the document within a year of the law's passage.

EPA said the guide will offer "information on technologies that may be feasible and appropriate" for disposal or destruction of PFAS, and will identify ongoing research activities on the matter, which could inform future guidance.

Further, the agency in August said it was still seeking answers as it launched a \$50,000 innovation contest to find alternative disposal methods to incineration, and as Administrator Andrew Wheeler blasted an Obama EPA official for efforts that prompted New Jersey to suspend a planned joint agency test of incineration methods on a PFAS-surrogate.

Citing the innovation challenge, one environmental consultant in late September doubted the disposal guidance would be very substantive.

EPA is under a congressional deadline to publish the interim guidance within one year of passage of the FY20 NDAA, which was enacted Dec. 20, 2019. Under the FY20 NDAA, Congress tasked EPA with writing a guidance for destruction of PFAS and materials containing the substances, including firefighting foam; soil and biosolids; textiles; consumer goods; spent filters and other waste from water treatment; landfill leachate; and solid, liquid or gas waste streams from manufacturing facilities.

The NDAA conference language also calls for EPA in its guidance to take into consideration the potential for releases of PFAS during destruction or disposal, such as through volatilization, air dispersion or leachate, and potentially vulnerable populations near destruction or disposal sites. Congress also told EPA that the document should provide guidance on testing and monitoring air, effluent and soil near disposal/destruction sites for releases.

OMB and EPA held teleconference meetings on the guidance with numerous industry representatives Aug. 27 and Sept. 9, including the U.S. Chamber of Commerce, American Chemistry Council, American Petroleum Institute, 3M, Dow, the Coalition for Responsible Waste Incineration and others.

#### Inside EPA: NRDC files FOIA suit against EPA over perchlorate communications

The Natural Resources Defense Council (NRDC) is suing EPA under the Freedom of Information Act (FOIA) in a bid to obtain records of communications between EPA, the Defense Department and industry over perchlorate -- data NRDC might use to boost a challenge to EPA's decision to forgo a national perchlorate drinking water standard.

NRDC Dec. 9 filed suit against EPA in the U.S. District Court for the Southern District of New York, charging the agency violated FOIA when it failed to promptly release documents the group sought this fall about perchlorate, a rocket fuel ingredient. NRDC asks the court to rule that EPA is violating FOIA and order it to release to NRDC "responsive, non-exempt records" and a log identifying which records are exempt from disclosure under FOIA.

In particular, NRDC is seeking "(1) communications regarding perchlorate between EPA and the Department of Defense, Department of Defense contractors, executive offices or industry actors; (2) information on the extent of perchlorate contamination in drinking water; and (3) EPA office assessments during EPA's review of its decision to withdraw the 2011 determination to regulate perchlorate," according to the group's complaint.

NRDC on Sept. 2 filed a FOIA request for the documents, and while the agency in November released 16 documents related to communication between EPA and industry, it did not release records responding to most of the FOIA request, NRDC says. EPA also has not indicated the date by which it would complete its search for records and release them, the group says.

The documents that NRDC is seeking could aid the group in its continuing litigation against EPA over the agency's decision in June that federal regulation of perchlorate in drinking water is unnecessary because water

systems have sufficiently lowered the chemical's occurrence in the water supply. That case, *NRDC v. Andrew Wheeler*, is currently in the U.S. Court of Appeals for the District of Columbia Circuit, where NRDC is challenging the validity of EPA's drinking water determination for perchlorate.

In the appellate case, NRDC is alleging violations of the Safe Drinking Water Act and administrative law as well as raising questions over whether EPA overstepped its legal authorities.

#### National Law Review: EPA Issues Draft Guidance on NPDES Permitting for Groundwater

The United States Environmental Protection Agency (EPA) issued draft guidance on Dec. 8, interpreting the Supreme Court's April 23, 2020, ruling in *Maui v. Hawai'i Wildlife Fund*. In Maui County, the Court ruled that pollutants that are discharged from a point source into groundwater, and end up reaching downgradient surface waters, may be treated as the "functional equivalent" of a direct discharge into that surface water body. We offered our interpretations of various aspects of the *Maui County* decision on this blog, shortly after the decision was issued.

Read more:

- [Muddy Waters: The Supreme Court Sets New Standard For When The CWA Applies](#)
- [Early Tea Leaves for Interpreting the Supreme Court's Maui Decision?](#)

Now, EPA has issued its draft interpretation to provide guidance to the regulated community and permit writers for incorporating the *Maui County* holding into existing Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit programs. The guidance applies only to situations in which EPA is issuing the NPDES permits, but it is expected to be applied to state permit programs as well.

The draft guidance provides a fairly narrow interpretation of the *Maui County* decision, in the interest of providing as much clarity as possible. EPA states that it expects that the number of permits issued based on the "functional equivalent" test will continue to be a small percentage of all permits issued.

The draft guidance sets forth the key foundational elements of NPDES permitting; permits are required for the *discharge* of a *pollutant*, through a *point source*, to a *water of the U.S.* (WOTUS). Each italicized term reflects specifically defined terms that have been subject to significant historic regulatory and judicial interpretation. *Maui County* reinforced those concepts, but the Supreme Court determined that certain discharges initially into groundwater can be recognized as the "functional equivalent" of direct surface water discharges of pollutants through point sources. The Supreme Court set forth seven non-exclusive factors to consider to determine if the functional equivalent standard applies to a specific discharge. In its draft guidance, EPA adds another factor for consideration by permittees and regulators. EPA asserts that the design and performance of the system or facility from which the pollutant is released is relevant to consideration of the factors laid out by the Supreme Court.

EPA's narrow focus on the core elements of NPDES permitting is accompanied in the draft guidance with certain statements limiting the scope of application of *Maui County*. For example, regulators should not assume that a discharge to groundwater that occurs in the vicinity of a surface water is the "functional equivalent" of a direct discharge. It may be prudent for site operators or regulators to conduct a technical analysis in situations where, for example, there is a discharge of "highly mobile" pollutants to sandy soils, or in an area where there is shallow groundwater in close proximity to a WOTUS. In that type of case, it may be useful to evaluate hydraulic conductivity, depth to groundwater, groundwater flowpath, or pollutant-specific dynamics along that flowpath to

determine if there is an actual discharge to surface waters and whether that discharge is the functional equivalent of a direct discharge to the WOTUS.

In particular, if a system is designed and operated to treat or attenuate pollutants, or it “uses the surface or subsurface to treat, provide uptake of, or retain water or pollutants,” then those facts may make it less likely that the situation will be considered to be the “functional equivalent” of a direct discharge. A mere allegation in comments on a draft permit, without supporting evidence, would not trigger a requirement for regulators to investigate the issue.

It is also relevant whether there are changes in the discharge before it meets the WOTUS; if the chemical composition or concentration are different than they were when initially discharged, then the discharge may not be the “functional equivalent” of a direct discharge.

Finally, EPA attempts to use its “system design and function” factor to discourage possible NPDES permit coverage for certain more traditional injection processes and needs, providing that the system components in fact prevent or abate discharges of pollutants to a WOTUS. These systems include:

- - septic systems
- - cesspools or settling ponds
- - runoff management systems, such as with stormwater controls, infiltration or evaporation system
- - other green infrastructure
- - facilities that operate water reuse, recycling or groundwater recharge facilities

Looking forward, NGOs have already expressed concern about EPA’s draft guidance, and it remains to be seen whether the incoming Biden administration will seek to review and possibly change this agency interpretation.

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